IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

KROY IP HOLDINGS, LLC, Plaintiff, v. SAFEWAY, INC. et. al., Defendant.	§ § § § § § §	Civil Action No. 2:12-cv-800 (LEAD CASE)
THE KROGER CO., Defendant.	§ § § § § § § § § §	Civil Action No. 2:13-cv-141 The Honorable Rodney Gilstrap The Honorable Roy Payne

PLAINTIFF'S OPENING BRIEF ON CLAIM CONSTRUCTION

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I. INTRODUCTION

Plaintiff Kroy IP Holdings, LLC ("Kroy IP") has accused each of Defendants Safeway, Inc. ("Safeway") and The Kroger Co. ("Kroger") of infringing U.S. Patent No. 7,054,830 (the "'830 patent"), entitled "System and Method for Incentive Programs and Award Fulfillment." The '830 patent discloses and claims a computer-based system that permits sponsors to conveniently create and administer incentive programs targeted to consumers. The consumers participate using a conventional computer to obtain awards such as merchandise discounts, coupons, prizes, services and other incentives, and may redeem these awards in the manner specified by the sponsor. The system enables sponsoring companies to offer such incentive programs involving one or more award providers, to target specific awards to consumers on a personalized basis, and to control the manner and geographic locations at which awards may be redeemed. The system can also communicate with inventory management systems associated with award providers, which enhances its overall flexibility, capabilities and effectiveness.

The inventions of the '830 patent were created by one of Kroy IP's principals, York Eggleston, with some assistance from a colleague Andrew Ukhov. Mr. Eggleston holds an A.B. degree in Government and an MBA, both from Harvard University. In the late 1980s he gained experience in systems and software development as the co-founder of Diva Enterprises, Inc. In the early 1990s, he was exposed to the retail and promotions sectors while working for the consulting firm Booz Allen Hamilton and as an investment professional at Salomon Brothers. He envisioned a need for a more effective and efficient way for businesses to create and conduct consumer promotions and incentive programs, particularly in an ever increasing digitally connected world. Mr. Eggleston eventually left his position at a venture capital and private equity firm to focus on developing his ideas in this area.

He designed and developed the systems and methods described in '830 patent, and applied for patent protection as a first time inventor. The first application related to this subject matter was filed on October 20, 1997, and related applications were subsequently filed claiming priority to it. Two original U.S. patents issued from these filings. U.S. patent No. 6,061,660 issued May 9, 2000. The related '830 patent asserted against the Defendants was filed as a continuation of that patent, and issued on May 30, 2006.

In recent years, the use of digital promotions has grown considerably in many sectors of the retail industry, including, for example, merchandise, grocery, restaurant, entertainment and travel. Kroy IP Holdings was formed to license the patented technologies and to offer strategic assistance and partnering opportunities backed by Mr. Eggleston's considerable knowledge and experience in this technology and marketplace.

Kroy IP asserts that the digital promotions systems of the Defendants infringe the following claims of the '830 patent:

- Safeway "Just For U" system: Claims 1 and 19-25
- Kroger "Plus Card" or "Shopper's Card" system: Claims 1 and 19-25

The Defendants have each denied infringement and asserted other defenses.

Kroy IP has pursued other lawsuits in this District asserting the '830 patent. However, those cases were resolved at an early stage, and did not result in any prior claim construction orders.

The parties dispute the scope and meanings of several terms recited in the asserted claims, and request that the Court resolve these disputes as a matter of law. The parties were able to agree on constructions for three terms in this case. The construction of seventeen claim terms remains in dispute. As explained below, Kroy believes that judicial construction of several terms identified by Defendants is not necessary or appropriate. This memorandum explains the proper interpretation of the disputed claim terms in accordance with controlling Federal Circuit law. For the reasons set forth below, Kroy IP respectfully requests that the Court adopt its proposed constructions of the disputed claim terms.

II. BACKGROUND OF THE '830 PATENT

As the '830 patent explains, incentive programs offer awards and incentives to modify behavior of individual consumers and to direct the consumers to some pre-determined action, such as purchase of products or services upon visiting a retail site, viewing advertising, testing a product, or the like. Companies may use awards and incentives to increase awareness of product offerings, to attract the attention of a newly identified audience, to encourage certain behavior, to obtain information, and for other purposes. (A030, '830 Patent at 1:39-48.)

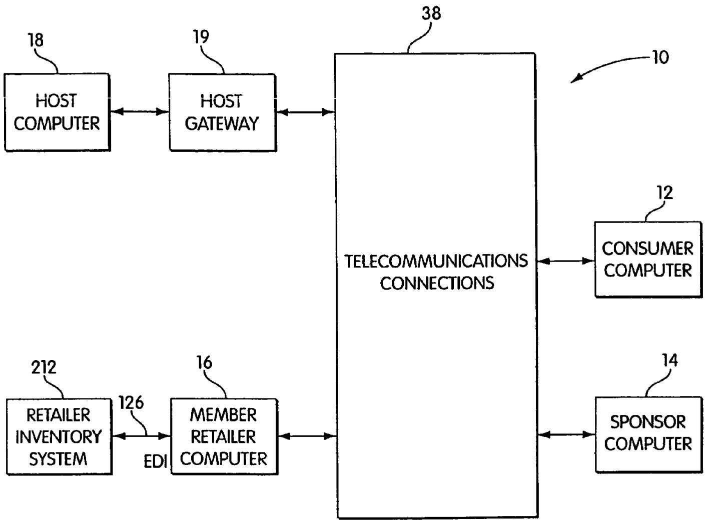
There were numerous drawbacks associated with approaches for conducting incentive programs available at the time of Mr. Eggleston's invention. One form of incentive program involved mailing promotional discount coupons to the customer as a reward for making an initial purchase. This was a very labor intensive approach. (*Id*. at 2:13-23.) Traditional coupon distribution and redemption approaches rely on consumers to clip and save coupons of interest and bring them to the store. Because few consumers will go through all the steps necessary to redeem their coupons, these programs are of limited effectiveness in achieving the manufacturer's objective to induce sales of its product. (*Id*. at 2:36-49.) Verification of redemption conditions also presents a challenge at check-out, especially when a consumer presents many coupons. (*Id*. at 2:50-54.)

The '830 patent explains that the costs to sponsoring companies of generating and administering traditional incentive programs may exceed their benefits. (*Id*. at 1:65-2:4.) These costs may be particularly high in instances where the activities associated with an incentive program involve a number of companies, or different organizations within the same company. (*Id*. at 2:4-7.)

The ‘830 patent explains that known computerized incentive programs addressed only some of the drawbacks of traditional promotions. (*Id*. at 2:64-3:1.) For example, U.S. Pat. No. 5,053,955 to Peach *et al.* discloses an improved process of printing and assembling coupons, reducing some of the associated paperwork. (A031, ‘830 Patent at 3:1-10.) Other computer-based systems were available to track certain aspects of consumer participation in incentive programs. For example, U.S. Pat. No. 5,056,019 to Schultz *et al.* discloses a method for providing manufacturer purchase reward offers by tracking consumers’ purchase histories and using a data processing system to determine if the required purchases have been made to earn a reward. However, the system of Schultz does not address the need for a system that assists sponsor companies in generating incentive programs, in tracking participation of consumers in multiple incentive programs, or in fulfilling awards. (*Id*. at 3:22-43.) Known computerized incentive programs also generally did not offer sponsors the ability to automate fulfillment of awards. The fulfillment of was often logistically difficult and expensive, requiring coordination of prize inventory, systems and information. (*Id*. at 4:20-32.)

The invention described in the ‘830 patent provides an incentive program and award fulfillment system that permits sponsors to build incentive programs easily and efficiently, and that provides for convenient tracking of participation and convenient, automated award fulfillment. The system supports incentive programs of a variety of types, such as employee incentive programs and customer promotions, involving awards such as merchandise, coupons, points, discounts, cash, services and other forms of incentives. (A033-36, ‘830 Patent at 7:38-42, 13:51-54).)

The following Fig. 2 provides a high-level overview of a system architecture for practicing the disclosed invention.



38
18
19
10
HOST COMPUTER
HOST GATEWAY
12
TELECOMMUNICATIONS CONNECTIONS
CONSUMER COMPUTER
212
16
14
RETAILER INVENTORY SYSTEM
126
EDI
MEMBER RETAILER COMPUTER
SPONSOR COMPUTER

Fig. 2

(A008, '830 Patent, Fig. 2.) The system includes a "host" system (18), which runs an incentive builder application program and is connected to one or more networks (38), such as the Internet. (A034, '830 Patent at 10:39-50.) A "sponsor," which includes any individual or company that wishes to offer an incentive program / promotion, may access the host system using a standard computer (14). (A033, '830 Patent at 7:51-53.) The sponsor may conduct a variety of activities, such as obtaining pre-packaged incentive programs and building new incentive programs by entering the parameters of and associating awards with the sponsor's incentive programs. (A032-36, '830 Patent at 6:13-19, 14:3-10, 14:23-46, 14:63-15:5.) A set of computer programs prompt the sponsor for the parameters needed to build a new promotion or incentive program, such as type of program, duration of the promotion, target participants, associated awards, conditions to obtain awards, etc. (A014-47, '830 Patent at Figs. 11-12, 30:47-53, 31:55-32-20, 35:3-22.) The system then creates the underlying software code to implement the sponsor-designed incentive program, creates HTML pages with appropriate graphics, text and fields for the end customer, and stores records and other information in appropriate databases. (A045-46, '830 Patent at 32:21-24, 33:12-52.)

Of particular relevance to the asserted patent claims, the disclosed invention permits the sponsor to target incentive programs and awards to categories of consumers based on consumer demographic (age, residence location, sex, etc.) and psychographic (opinions, interests, etc.) information. This information may be obtained during consumer registration, from tracking consumer participation in incentive programs and/or from consumer responses to specific inquiries, and is accessible by sponsors. (A019-50, '830 Patent at Figs. 16, 17 and 13:3-25, 15:16-23, 18:43-54, 31:37-40, 41:62-67.) The sponsor may also provide parameters that control award fulfillment and redemption, such as fulfillment by the sponsor via mail, fulfillment at a retail location or by a third-party program participant. The sponsor-specified fulfillment details are stored in a database. (A032-52, '830 Patent at 6:13-19, 20: 13-16, 21:58-63, 41:11-20, 46:42-56.) The fulfillment details may include sponsor-specified geographic locations at which a particular award is available, such as for example, in the region identified by a particular ZIP code. (*Id.; see also* 39:41-54). In this manner, sponsors may target awards demographically and by geography to increase traffic to desired retail outlets. (A0050, '830 Patent at 42:39-49.)

Consumers who wish to participate in incentive programs offered by sponsors may do so using a standard computer to interact with a consumer section of web site hosted on a server of a host system. The consumer may register to become a member of one or more incentive programs. (A035, '830 Patent at 12:18-33.) The incentive programs could include a variety of games, or, alternatively, may include entering data, completing surveys, clicking on one or more icons in a pre-determined manner, or other "win eligible" activities, such as answering questions or participating in a customer loyalty program. (A036-44, '830 Patent at 13:40-48, 30:57-31:3.) The consumer site also provides rules and directions for participating in incentive programs and information tracking the consumer's activities and incentive program awards. (A035-36, '830 Patent at 12:54-13:2.) A consumer member may be provided with electronic card for storing information associated with the consumer for use when the consumer redeems an award at a retail point-of-sale device. (A032-50, '830 Patent at 6:46-51, 13:25-39, 22:17-31, 42:4-15.)

Any individual or company that wishes to provide awards or prizes to be associated with incentive programs may participate as a "retailer." Retailers may also participate in the fulfillment or delivery of awards to consumers. (A0032-34, '830 Patent at 6:20-23, 7:54-56, 10:22-4.) Retailers access the system via a retailer computer (16) to make retail items in their inventory available to sponsors for association with incentive programs as awards. (A0035-37, '830 Patent at 11:33-52, 15:31-47.) The '830 patent explains that an entity may have the dual roles of both retailer and sponsor of an incentive program. (A0040, '830 Patent at 21:3-17.)

The disclosed invention provides a number of benefits. For example, it does not require substantial sums of working capital tied up with inventory or capital expenditures, enables sponsors to target awards by demographic preferences or geography and to incent with multiple products of various price points efficiently, and to increase traffic to retail outlets. It also enables promotions to be launched across multiple store networks with a single fulfillment card. (A0040, '830 Patent at 21:3-17.)

During prosecution of his patent application, Mr. Eggleson's originally submitted claims were rejected over prior art references including U.S. Patent No. 5,774,870 to Storey. The Storey patent is directed to an on-line frequent flier type awards program that permits a consumer to accumulate award points and then select a merchandise item corresponding to a designated number of points. (A0366-72, Dec. 8, 2000 Office Action at pp. 2-7.) In response, the applicant explained:

> Automated award fulfillment, according to the present invention, ***includes sponsor designated redemption*** whereby the sponsor of the award may designate what award will be provided to the consumer user, and may designate the location of the redemption. For example, the location may include the geographical location of the retailer, merchant or point of sale (POS). . . . Storey, by comparison, describes consumer user designated selection of an award and how to redeem the award and then a manual fulfillment house arranges to deliver the award to the consumer user. . . . Storey facilitates flexibility and ease for the

> ***consumer user*** regarding the selection and fulfillment of awards, while ***the present invention gives such flexibility and ease to the sponsor of the award***, rather than the consumer.

(A398-99, June 8, 2001 Amendment and Reply at pp. 16-17 (emphasis in original).) The presented claims were then amended to more clearly recite that the automated award fulfillment of the claimed systems and methods allows the sponsor to select a "specific award unit item tailored to demographic and psychographic preferences of a sponsor-selected consumer user" and to "provide a sponsor-selected geographic location for fulfillment." (A585-99, Jan. 25, 2002 Reply and Request for Reconsideration at pp. 32-46.) These distinctions over the prior art were again explained to the U.S. Patent & Trademark Office ("USPTO") examiner. (A577-82, *id.* at pp. 24-29.)

The claims were later rejected as unpatentable over a combination of US. Patent No. 5,996,007 to Klug and 5,537,314 to Kanter. (A607-12, Feb. 26, 2002 Office Action at pp. 2-7.) The Klug reference describes a system for targeting content to Internet users tailored to the user interests. Kanter relates to a marketing referral system. (A638-39, Aug. 26, 2002 Amendment and Reply at 22-23.)

The claims were amended in response to those rejections to specify that the software of the claimed systems and methods communicates with an inventory management system associated with incentive program providers. (A644-51, *id.* at 28-35). Mr. Eggleston then emphasized this further distinction over the prior art:

> Kanter has no knowledge of merchant provider's inventory data, let alone real time knowledge and allocation of inventory. Kanter only allows a designation of a redemption location and a general amount of redemption. Kanter, also teaches *consumer user* selection of an item to be redeemed in exchange for accumulated credit value.
>
> . . .
>
> Unlike Klug, Applicant's invention deals with ***automated award fulfillment.*** Automated award fulfillment, according to the present invention, ***includes sponsor designated or selected redemption*** whereby the sponsor of the award may select or determine what award unit (see Specification at page 93, line 9, for

> example) will be provided to the consumer user, by communication with an ***inventory management system of multiple provides*** and may designate the location of the redemption (see Specification at page 95, line 20, for example). The selection can also include a specific consumer user selected by the sponsor which can, e.g., be instructed to go to a store identified as having the award by the inventory management system to pick up the award unit (See for example page 97, line 14-17). . . . For example, the location may include the geographical location of the retailer, merchant or point of sale (POS) (See for example page 96, lines 2-20).
>
> Klug and Kanter, alone or in combination do not teach or suggest ***an inventory management system,*** of independent claims 1, 3, 6, 11, 33, 34 and 49, as amended, as well as claim 39 including being in communication with a mechanism for managing and tracking ***inventory*** data, for coupling with a consumer's demographic and psychographic preferences.

(A639-41, *id.* at pp. 23-25 (emphasis in original).)

After additional minor further clarifying amendment, the claims were ultimately approved and allowed to issue. (A659-99, Dec. 18, 2002 Amendment and Reply; A716-47, Oct. 23, 2003 Reply and Request for Reconsideration; A753-73, November 10, 2004 Amendment; A798-812, March 23, 2005 Corrected Notice of Allowance.)

III. APPLICABLE LAW REGARDING CLAIM CONSTRUCTION

Claim construction is to determine what sometimes terse or unfamiliar words in patent claims mean. *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339 (Fed. Cir. 2001). Claim construction is a matter of law for the Court. *Markman v. Westview Instr., Inc.*, 52 F.3d 967, 977 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). The focus is on "what one of ordinary skill in the art at the time of the invention would have understood the term to mean." *Id.* at 986.

To ascertain the meaning of claims, the Court looks to three primary sources: the claims, the specification, and the prosecution history. *Markman*, 52 F.3d at 979. In *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), the Federal Circuit set forth several guideposts that courts should follow when construing claims. The Court emphasized that "the claims of a patent define the invention to which the patentee is entitled the right to exclude." 415 F.3d at

1312 (*quoting Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.,* 381 F.3d 1111, 1115 (Fed. Cir. 2004)). The words used in a claim are generally given their ordinary and customary meaning, which "is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Id.* at 1313. The relevant time period for the '830 patent is December 10, 1997, which is the filing date of the provisional patent application No. 60/067,776 to which priority was claimed.[1]

The claims themselves provide substantial guidance as to the meaning of claim terms, and the context in which a term appears in the claim can be highly instructive to its meaning. *Id.* at 1314. It is the function of the claims, not the specification, to set forth the limits of the patentee's claims. Otherwise, there would be no need for claims. *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985)(en banc).

The person of ordinary skill, through whose eyes the claims are construed, is deemed to read the words used in the patent documents with an understanding of their meaning in the field, and to have knowledge of any special meaning and usage in the field. *See Phillips,* 415 F.3d at 1313. Dictionaries, encyclopedias and treatises may be useful sources in understanding a term's ordinary meaning because they collect the accepted meanings of terms used in various technical fields. *Id.* at 1319. These sources may be consulted when construing claim terms, so long as they are not used to contradict any definition found in or ascertained by reading the patent and other intrinsic evidence. *Id.* at 1319.

Because the claim language controls claim scope, the threshold for construing a term is showing some ambiguity in the claim language. *See, e.g., Liquid Dynamics Corp. v. Vaughan*

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[1] The '830 patent also claims priority to a utility patent application filed March 18, 1998. Kroy believes that the meaning of the disputed claim terms to persons skilled in the art is not affected by the three month time difference.

Co., Inc., 355 F.3d 1361, 1367 (Fed. Cir. 2004). The purpose of claim construction is to clarify legitimate ambiguities, not to simply rewrite the claims using different words. *See, e.g., K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1364 (Fed. Cir. 1999) ("Courts do not rewrite claims; instead, we give effect to the terms chosen by the patentee."); *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 905 (Fed. Cir. 2004) (finding no ambiguity in the proposed term and declining to construe it).

With regard to the patent specification, the *Phillips* Court explained:

> Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.

Id. at 1314-17; *see also V-Formation, Inc. v. Benetton Group SpA*, 401 F.3d 1307, 1310 (Fed. Cir. 2005) (the intrinsic record "usually provides the technological and temporal context to enable the court to ascertain the meaning of the claim to one of ordinary skill in the art at the time of the invention"). The specification may limit a claim term if it reveals a special definition given to the term that differs from the meaning it would otherwise possess. *Phillips*, 415 F.3d at 1316. The specification may also be limiting if it reveals an intentional disclaimer, or disavowal, of claim scope by the inventor. *Id.*

However, it is the function of the claims, not the specification, to set forth the limits of the scope of protection. Hence, it is improper to limit claims based on embodiments appearing in the specification when the claim language is broader. *Electro Med. Sys., S.A. v. Cooper Life Sciences, Inc.,* 34 F.3d 1048, 1054 (Fed. Cir. 1994). The purpose of the specification is to inform and teach, not to define the legal scope of protection. *See Phillips,* 415 F.3d at 1316. The en banc *Phillips* decision reaffirmed that claims are ordinarily not limited to details of the disclosed embodiment(s). *See Phillips,* 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.”). The *Phillips* Court reasoned that “persons of ordinary skill in the art rarely would confine their definitions of terms to the exact representations depicted in the embodiments.” *Id.* “The claim, not the specification, measures the invention.” *SRI Int’l*, 775 F.2d at 1121.

The prosecution history also plays a role in claim interpretation. The prosecution history helps to demonstrate how the inventor and the PTO understood the patent. *Phillips*, 415 F.3d at 1317. However, because the file history “represents an ongoing negotiation between the PTO and the applicant,” it may lack the clarity of the specification and thus is deemed less useful in claim construction proceedings. *Id*.

A court may also receive extrinsic evidence in the form of expert testimony to educate itself about the invention and the relevant technology, or to establish that a term in the patent has a particular meaning in the pertinent field. *Id.* at 1318. *See also Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1308-09 (Fed. Cir. 1999). However, the court should consider such testimony in the context of the intrinsic evidence and may not use it to arrive at a claim construction that contradicts the construction mandated by the intrinsic evidence. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583-84 (Fed. Cir. 1996). The parties in this case have not proffered expert testimony in support of their claim construction positions.

IV. THE PROPER CONSTRUCTION OF THE CLAIM TERMS

The asserted independent claims 1 and 19 are set forth below, with the disputed claim language highlighted:

1. A system for ***incentive program*** participation and ***automated award fulfillment***, comprising: a ***host*** computer coupled to a network; a ***first database*** accessible from said ***host*** computer; and an ***automated award fulfillment*** application program executed on said ***host*** computer for participation in ***incentive programs*** of a plurality of ***provider***s in communication with ***an inventory management system associated with each*** of said plurality of ***provider***s wherein said automated award fulfillment application program provides ***sponsor-selected fulfillment***, said

automated award fulfillment application program comprising: code adapted to provide a ***sponsor-selected specific award unit item***, said ***sponsor-selected specific award unit item*** being tailored to ***demographic*** and ***psychographic preferences*** of ***a sponsor-selected consumer user***, and code adapted to provide ***a sponsor-selected geographic location for fulfillment***.

19. A method for providing an ***incentive program***s and automating award fulfillment, comprising: providing a ***host*** computer; providing an ***incentive program*** on the ***host*** computer, wherein a participant may participate in said ***incentive program***; providing a database of ***award***s on the ***host*** computer associated with the ***incentive program***; and providing ***automated award fulfillment*** of said ***award***s to participants, including providing communication with ***an inventory management system associated with each*** of a plurality of ***provider***s wherein said ***automated award fulfillment*** comprises providing ***sponsor-selected fulfillment*** comprising providing a ***sponsor-selected specific award unit item***, providing said ***sponsor-selected specific award unit item*** tailored according to ***demographic*** and ***psychographic preferences*** of ***a sponsor-selected consumer user***, and providing ***a sponsor-selected geographic location for fulfillment***.

The full text of all asserted claims appears at A900-901, with the disputed claim language highlighted.

A. AGREED CLAIM TERMS

The parties reached agreement as to the interpretation of the terms "sponsor," 'plurality of providers," and "plurality of sponsors." Kroy therefore requests that the Court construe each such term as set forth at pp. 1-2 of the Joint Claim Construction and Prehearing Statement. (D.I. 235.) The agreed terms and constructions are also set forth in the attached Appendix 1.

B. DISPUTED CLAIM TERMS

The disputed language of the asserted claims of the '830 patent is discussed below. The assigned Term Nos. correspond to the order presented in the Joint Claim Construction Chart.

1. Term No. 1 - "incentive program"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
Any program designed to incentivize or reward desired behavior.	No construction necessary

The asserted claims are directed to systems and methods for providing and operating "incentive programs." The claims themselves provide no indication that the invention is limited to any particular type of incentive program.

In introducing the background of the invention, the specification explains:

> Incentive programs offer awards and incentives to modify behavior of individual consumers and to direct the consumers to some pre-determined action, such as purchase of products or services upon visiting a retail site, viewing advertising, testing a product, or the like.

(A030, '830 Patent at 1:39-43.) The specification then confirms that the term is intended to encompass all forms of incentive programs:

> The phrase "incentive program" should be understood to include any program for creating incentives, including programs within a sponsoring firm, such as employee incentive 40 programs, and outside the firm, such as customer promotions.

(A033, '830 Patent at 7:38-43.) Taken together, these statements essentially define the term "incentive program" in the context of the '830 patent to encompass any program designed to incentivize or reward desired behavior. Kroy's proposed interpretation is appropriate to confirm the broad usage of the term in the '830 claims.

Defendants have not identified any fault in Kroy's proposed interpretation or offered an alternative interpretation, but assert that it is not necessary to construe this term. Kroy believes that it is appropriate to instruct the jury regarding the breadth of the term "incentive program" as used in the '830 patent. However, if the Court determines that the broad meaning is sufficiently clear in context such that construction is not necessary, Kroy will also accept that result.

2. Term No. 2 - "award"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
All types of incentives, including merchandise, coupons, points, cash, services and other forms of incentives.	No construction necessary

Independent claim 1 refers to "automated award fulfillment," and claim 19 refers to "automating award fulfillment" and to "a database of awards." Asserted dependent claims 20 – 23 also recite the term "award" or "awards." The asserted claims as a whole are not limiting with regard to the types of awards contemplated.

The '830 patent specification explicitly states: "the term 'award' should be understood to be synonymous and to encompass all types of incentives, including merchandise, coupons, points, cash, services and other forms of incentives." (A033, '830 Patent at 7:44-47.) Kroy's proposed interpretation gives effect to this explicit definition.

Here again, Defendants contend that the term "award" need not be construed, but have not challenged the substance of Kroy's proposed interpretation or offered any alternative. Kroy believes that the Court should construe this term to give effect to the inventor's broadly stated definition and to minimize the risk of the jury applying a more restrictive meaning.

3. Term No. 3 - "automated award fulfillment"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary. If construed, the term means: "award fulfillment involving computer controlled steps."	Award allocation and redemption without customer action

Independent claim 1 refers in its preamble to a system for "automated award fulfillment." Because the term appears only in the preamble, the Court should hold that it is not a claim limitation of this claim. "Generally, the preamble does not limit the claims." *Allen Eng'r Corp. v. Bartell Indus.*, 299 F. 3d 1336, 1346 (Fed. Cir. 2002). "If the preamble is necessary to give life, meaning and vitality to the claim, then the claim preamble should be construed as limiting. *Id*. (citations omitted). Here, the preamble of claim 1 is not necessary to give life, meaning or vitality to the claim because the body of the claim fully defines its metes and bounds.

Method claim 19 recites the step of "providing automated award fulfillment of said awards to participants . . . ." Related language in this claim expressly provides:

> wherein said automated award fulfillment comprises providing sponsor-selected fulfillment comprising providing a sponsor-selected specific award unit item, providing said sponsor-selected specific award unit item tailored according to demographic and psychographic preferences of a sponsor-selected consumer user, and providing a sponsor-selected geographic location for fulfillment.

This language confirms what "automated award fulfillment" requires, and what it does not require, in the context of claim 19 as a whole.[2] Related dependent claims add details describing more specific techniques for providing "automated award fulfillment" (e.g., claim 21 ("associating an award with the incentive program; and associating a fulfillment method with the award") and claim 23 ("providing a card comprising memory for storing data associated with a user.")).

Several conclusions become immediately clear. First, the term "automated award fulfillment" is a general term used to introduce more specific, separately recited details of the award fulfillment steps of a given claim. And as such, the term cannot be construed divorced from its surrounding claim context. Second, the term is not ambiguous because each claim details the specific "automated award fulfillment" steps required by that particular claim. Third, construing this term would only lead to jury confusion by distorting the overall structure and flow of each claim as drafted and issued.

It is also apparent that Defendants' contention that "automated award fulfillment" means "award allocation and redemption without customer action" is not correct. That interpretation contradicts the claims themselves and the remaining intrinsic record, and should therefore be

[2] In the event that the Court determines that "automated award fulfillment" is a limitation of claim 1, we note that claim 1 similarly recites an "automated award fulfillment application program comprising: code adapted to provide a sponsor-selected specific award unit item, said sponsor-selected specific award unit item being tailored to demographic and psychographic preferences of a sponsor-selected consumer user, and code adapted to provide a sponsor-selected geographic location for fulfillment."

rejected.

In this regard, the noun "automation" refers to "automatic operation or control of a process or system or of equipment." (A895, WEBSTER'S II NEW COLLEGE DICTIONARY 76 (1995).) The verb "automate" means "to convert to or make use of automation" (*Id.*) or "to operate or control by automation." (A887, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 140 (2nd Ed. 1997).) The familiar and well-understood ordinary meanings of these words certainly do not suggest that "automated award fulfillment" in the '830 patent claims means a process automated to the extent of eliminating all customer action whatsoever. The essence of award fulfillment being "automated" is that the process makes use of some degree of automatic operation or control, not the elimination of all human involvement.

More fundamentally, as mentioned, every claim recites the specific details of "automated award fulfillment" required of that claim. No claim recites "award allocation and redemption without customer action." If "automated award fulfillment" was intended to mean allocation and redemption of awards without customer action, the claims would certainly have included language to that effect.

Although the claim language itself is dispositive on this issue, we note also that there is nothing in the specification or the prosecution history files that would lead a person of ordinary skill to conclude that "automated award fulfillment" is limited to "award allocation and redemption without customer action." The specification throughout describes how the invention facilitates the consumer's active participation in incentive programs via interaction with a web site, such as by clicking on icons, entering data, completing surveys, answering questions and other "win-eligible" activities. (*See e.g.*, A036, '830 Patent at 13:40-54). The specification also makes clear that the demographic and psychographic consumer information used to allocate awards according to the patent claims may be obtained via consumer action:

> A psychographic or demographic sub-record 822 may include information obtained through consumer responses to inquiries answered by the consumer during participation in incentive programs.

(A036, '830 Patent at 13:16-22.) The invention thus requires consumer action as a prerequisite for award allocation; it does not exclude it.

The specification also describes the consumer's direct participation during at least some sponsor-selected modes of award redemption:

> Next, at a step 436, the information regarding a retailer location for purchase of the prize is transmitted to the consumer. Finally, when the consumer goes to the retail location, the consumer displays the consumer's electronic card 11 which includes the personal identification number that permits the retailer to confirm that the consumer is the consumer who has participated in the incentive program and has won the prize.

(A040, '830 Patent at 22:15-22; *see also* A051-52*, id.* at 44:13-21; 46:64-47:3).

As discussed in Section II above, the applicant emphasized during prosecution that automated award fulfillment per the invention provides flexibility to the incentive program sponsor by allowing the sponsor to designate what award will be provided to the consumer user and locations for redeeming the award. The asserted claims expressly provide for this via limitations requiring "a sponsor-selected specific award unit item" and "a sponsor-selected geographic location for fulfillment." But the applicant did not represent during prosecution that "automated award fulfillment" per the invention requires the sponsor to allocate awards without any consumer action, or that awards be redeemed without customer action.

Accordingly, Defendants' proposed construction of "automated award fulfillment" should be rejected. This term should not be construed because the details of what it entails are expressly recited in each claim. If the Court nevertheless believes that construction is necessary, Kroy submits that the meaning most consistent with the claims as a whole and the remaining intrinsic record is "award fulfillment involving computer controlled steps."

4. Term No. 4 - "host"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
any individual or company who provides a host computer for permitting sponsoring companies to offer incentive programs to consumers, employees, suppliers, partners and the like of the individual company	individual or company who wishes to provide a system for permitting sponsoring companies to offer incentive programs to customers

Independent claims 1 and 19 each refer to refers to a "host computer." The specification states:

> The term "host," as used herein, encompasses ***any individual or company who wishes to provide a system for permitting sponsoring companies to offer incentive programs to consumers, employees, suppliers, partners and the like of the individual or company . . .***

(A033, '830 Patent at 8:10-14) (emphasis supplied).) The parties each offered slight variants of this as their proposed construction.

After further consideration, Kroy suggests that the Court need not construe the term "host" because it does not appear in the claims separate from the term "host computer," as to which no party requested judicial construction. Should the Court construe the term "host," Kroy further suggest that the minor wording differences between the competing proposals be resolved by adopting verbatim the italicized text of the above quoted definition in the specification.

5. Term No. 5 - "first database"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary	database of awards

Independent claim 1 recites "a host computer coupled to a network" and "a first database accessible from said host computer." There is no ambiguity in the term "first database" to justify replacing it with the words "database of awards."

The '830 patent specification discloses at least three databases that may be utilized in implementing the invention, including "customer database 200," "sponsor database 202" and "award database 204." (A0018, '830 Patent at Fig. 15.) Claim 1, however, recites generically "a first database accessible from said host computer," which, by its own terms, refers to any database of information that the host computer can access in connection with the claimed incentive program system. Consistent with the remainder of the claim, the first database may include, for example, data about "providers," "inventory," "sponsors," "awards," or "consumer users." Indeed, dependent claim 4 introduces "a member management database" and further states that a sponsor is allowed to select an award "tailored to demographic and psychographic preferences of the consumer user stored in at least one of any of said member management databases or said first database . . . ." (A053, '830 Patent at 47:57-63.) This further confirms that the first database could store consumer demographic and psychographic data. Independent claim 19, which does recite "a database of awards," confirms that when the applicant intended to specify a database of awards, he did so explicitly.

The Court should not rewrite this unambiguous claim term and should give effect to the words chosen by the patentee by declining to construe it. *K-2 Corp.*, 191 F.3d at 1364.

6. Term No. 6 - "provider"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
a participant who provides awards associated with an incentive program	individual or company that provides an incentive program

Independent system claim 1 requires "an automated award fulfillment application program executed on [a] host computer for participation in incentive programs of a plurality of providers in communication with an inventory management system associated with each of said plurality of providers . . . ." Independent claim 19 similarly recites a method for providing incentive programs that involves "providing a database of awards on [a] host computer" and providing automated award fulfillment that entails "providing communication with an inventory management system associated with each of a plurality of providers . . . ."

The parties dispute the meaning of the word "provider" of the phrase "plurality of providers" in asserted claims 1 and 19. Defendants' mistakenly assert that "provider" refers to an "individual or company that provides an incentive program." This interpretation confuses the term "provider" with the term "sponsor." The specification plainly indicates that, for purposes of the invention, "any individual or company that wishes to offer an incentive program or promotion" is referred to as a "sponsor." (A0033, '830 Patent at 7:51-53). The parties have stipulated to this as the definition of "sponsor." The specification does not use the terms "provider" and "sponsor" interchangeably, as Defendants attempt to do.

Dependent claim 2 recites the system of claim 1 "wherein said plurality of providers comprise at least one of a host, a retailer, a merchant, and a sponsor." This conclusively shows that "provider" is not synonymous with "sponsor." While a "provider" may offer an incentive program (and have the dual role of sponsor), that role is not the essence of the term "provider" in the claims.

In this regard, the '830 patent specification introduces the term "retailer" to refer to an "individual or company" that provides awards, while also explaining that awards may alternatively be provided by the incentive program sponsor, the host or other parties:

> The term "retailer," as used herein, encompasses any individual or company that wishes to ***provide*** awards and prizes to be associated with incentive programs. The term "retailer database" should be understood to encompass a database of awards and prizes for fulfillment to consumers who have successfully won or completed incentive programs. Thus, the retailer database should be understood to include awards and prizes ***provided by*** sponsors, by the host, or by other parties, not only retailers.

(A033, '830 Patent at 7:54-62) (emphasis supplied).) This teaching fully supports the interpretation of "provider" in the claims to refer to any participant who provides awards. Indeed, claim 2 confirms that the patentee intended "provider" to encompass all of these types of incentive program participants.

The specification also describes an example implementation in which a retailer identifies awards available for selection by an incentive program sponsor, using a computer system that is also connected to the retailer's inventory management system:

> After registration the retailer may participate in various activities; however, the primary function of the award site 198 is to permit the retailer to list information regarding prizes the retailer wishes to include in a menu of various prizes offered by the retailer. Thus, the retailer can list prizes for selection by sponsors. The award database 204 that is created by participation by the retailer is also connected via an electronic data interchange 126 to the retailer's proprietary inventory system 212.

(A037, '830 Patent at 15:35-44.) The full limitation in claim 1 recites: "host computer for participation in incentive programs of a plurality of providers in communication with an inventory management system associated with each of said plurality of providers." In view of the disclosure of communicating with an inventory management system in the process of making awards available, "provider" in this limitation clearly refers to a participant who provides awards associated with an incentive program. Consistent with the disclosure in the patent specification, the claimed invention permits a sponsor to implement incentive programs involving multiple award providers ("incentive programs of a plurality of providers"). The similar language of claim 19 compels the same conclusion.

Kroy's proposed interpretation of "provider" as referring to a participant who provides awards is consistent with both the claim language and the '830 patent specification, and should be adopted.

7. Term No. 7 - "an inventory management system"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary. If construed, the term means: "one or more systems that manage inventory."	a system maintained by a retailer to keep track of its available merchandise

The phrase "an inventory management system" is not ambiguous in context and therefore should not be construed. Defendants' attempt to introduce the narrowing gloss "maintained by a retailer" should be rejected. As just discussed, the term "provider" is not limited to a traditional retailer, and also refers to a merchant, sponsor, host or other party that provides awards for an incentive program.[3] Defendants' proposal would also create rather than resolve ambiguity because it is not clear what the extraneous phrase "maintained by" (which itself has multiple interpretations) means or requires. The proposal is also incorrect because the claimed invention is not limited to tracking awards in the form of "merchandise. Other types of awards are disclosed and contemplated.

The only possible need for judicial construction is to confirm the general rule that the indefinite article "an" means "one or more" in open-ended claims containing the transitional phrase "comprising." *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008). The Federal Circuit "has repeatedly emphasized that an indefinite article 'a' or 'an' in patent parlance carries the meaning of 'one or more' in open ended claims containing the transitional phrase 'comprising.'" *KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1356 (Fed. Cir. 2000). "Unless the claim is specific as to the number of elements, the article 'a' receives a singular interpretation only in rare circumstances when the patentee evidences a clear intent to so limit the article." *Id.* at 1356. Where the claims and written description could be read to encompass either a singular or plural interpretation of 'a' or 'an,' the plural meaning applies. *Baldwin*, 512 F.3d at 1343. Claims 1 and 19 are open-ended reciting the transitional phrase "comprising." Therefore the presumption that the article "a" means "one or more" applies.

[3] In the event the Court introduces the term "retailer" into the claim by accepting Defendants' construction of "an inventory management system," then Kroy would respectfully request that the term "retailer" also be construed to reflect that it "encompasses any individual or company that wishes to provide awards and prizes to be associated with incentive programs," as stated in the specification. (A033, '830 Patent at 7:54-56.)

Accordingly, if construed at all, this term should be given its full meaning: "one or more systems that manage inventory."

8. **Term No. 8** - "associated with each"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary. If construed, the term means: "having some association with each."	connected through an electronic data interchange connection with the custom interface of each

The related language in claims 1 and 19 stating that an inventory management system is "associated with" each of a plurality of providers also presents no ambiguity requiring judicial construction. The ordinary meaning of "associate" is "to unite in a relationship," "to connect or join together," or "to connect in the mind or imagination." (A894, WEBSTER'S II NEW COLLEGE DICTIONARY 68 (1995).) The phrase "associated with" therefore broadly implies any connection or relationship between. An inventory management system may be "associated with" an award provider, for example, by storing information related to the provider's awards or by communicating with other systems of the provider. Per the claims, an inventory management system need only have some association with providers.

The Court should decline the invitation to rewrite the broad language "associated with" as if the claim had instead recited the complicated, restrictive language of Defendants' proposed definition. Throughout the extensive prosecution proceedings in the USPTO which led to issuance of the '830 patent, the details of using an electronic data interchange connection or a custom interface were never made part of its claims. Moreover, Defendants' improper attempt to limit the claims to unclaimed details of a preferred embodiment is an in artful one at that. The patent specification discloses an example system in which an award database is connected via an electronic data interchange connection to a retailer's inventory management system. (A049, '830 Patent at 39:18-24.) It does not describe an inventory management system connected through an electronic data interchange connection "with the custom interface of each" of a plurality of providers, as Defendants' confusing proposal purports to require.

9. Term No. 9 - "sponsor-selected fulfillment"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary. If construed, the term means: "fulfillment according to parameters selected by a sponsor."	sponsor-selected specific award unit item, sponsor-selected consumer user, and sponsor-selected geographic location for fulfillment

The phrase "sponsor-selected fulfillment" in claims 1 and 19 should also be left undisturbed. Other language comprehensively sets forth the requirements of sponsor-selected fulfillment in each claim. In particular, method claim 19 expressly recites "providing sponsor-selected fulfillment comprising providing a sponsor-selected specific award unit item, providing said sponsor-selected specific award unit item tailored according to demographic and psychographic preferences of a sponsor-selected consumer user, and providing a sponsor-selected geographic location for fulfillment." System claim 1 includes similar language. The term "sponsor-selected fulfillment" per se simply means fulfillment according to parameters selected by a sponsor. The term need not be defined, however, because its meaning is clear in the context of the particular sponsor selected-parameters recited in the claims.

Providing a redundant definition that tracks the related claim language describing sponsor-selected fulfillment would only risk juror confusion. Moreover, Defendants' proposal is inconsistent with the actual claim language because it fails to reflect that the sponsor selects an award unit item "tailored according to demographic and psychographic preferences" of the selected consumer user.

10. Term No. 10 - "sponsor-selected specific award unit item"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
a specific award and corresponding identifying and/or classifying information selected by the sponsor to be associated with a particular incentive program	the specific item available as an award from the inventory management system selected by the sponsor (not the consumer)

The unfamiliar phrase "sponsor-selected specific award unit item" is explained in the '830 patent specification. The specification explains the term "award unit" as follows:

> The items stored in the award database may include the method of fulfillment (i.e. by a third party, by a sponsor or by a retailer), identification numbers of the item, which may be accomplished by utilizing the retailer's inventory identifying data, a description of the item and the number of items available. In the case of retailer redemption, additional items could include a number assigned to the merchant, the merchant's store number, and the geographic location of the award or reward items, which may be sorted by zip code or area code. ***The prize or reward and all of the corresponding identifying or classifying information can be characterized as an award unit.*** An understanding of the award unit is important, because consumers may win award units, not just awards.

(A050, '830 Patent at 41:11-24 (emphasis supplied).) It goes on to describe how the disclosed system permits a sponsor to select award units for its incentive program:

> As described above, via an interface (and after selection or design of an incentive program) a sponsor could select an award unit to be associated with a particular sponsor incentive program, and the subsequent association will be stored in the sponsor database 202. . . . The sponsor could also input its own awards and 40 associated information (description, fulfillment method, etc.) in order to define the award units to be associated with the sponsor's incentive program or programs.

(A050, '830 Patent at 41:33-43.) Kroy's proposed interpretation of "sponsor-selected specific award unit item" comports with the meaning implicit from these passages in the specification.

Defendants' proposed interpretation fails to give effect to the meaning of award unit explained in the specification. It should be rejected for the additional reason that it conflates this term with "award" despite the clear teaching in the specification that an award unit is not just an award. The remaining aspects of their proposal also do not follow from the claims or the other intrinsic record. In particular, the claims do not mention a sponsor selecting an inventory management system. The Court should reject this substantial departure from the scope and meaning of the issued claims.

11. Term No. 11 - "award unit item"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary beyond the construction of "sponsor-selected specific award unit item."	item available as an award from the inventory management system

The term "award unit item" is subsumed within the complete phrase "sponsor-selected award unit item." Kroy submits that it should not be separately construed. Consistent with our position stated in the previous section, "award unit item" means "a specific award and corresponding identifying and/or classifying information."

12. Term No. 12 - "demographic . . . preferences"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
preferences associated with a group of consumers that has a particular set of qualities	preferences based on directly observable traits of a consumer (e.g., sex, marital status, income, occupation, location)

System claim 1 includes a limitation requiring "code adapted to provide a sponsor-selected specific award unit item . . . tailored to demographic and psychographic preferences of a sponsor-selected consumer user . . . ." Method claim 19 similarly recites "providing said sponsor-selected specific award unit item tailored according to demographic and psychographic preferences of a sponsor-selected consumer user . . . ."

Demographic information relates to a set of qualities or characteristics associated with a particular group of people. This general understanding of demographic information to those skilled in the art is shown by the following representative references:

demographics: *n.* the qualities (such as age, sex, and income) of a specific group of people;

demographic: *n.* a group of people that has a particular set of qualities

demographics: *n.* the statistical characteristics of human populations (as age or income) used especially to identify markets

(A882-83, http://www.merriam-webster.com/dictionary/demographic (last visited Dec. 23, 2013).)

demographic *adj.*	of or pertaining to demography
demography: *n.*	the study of the characteristics of human populations as size, growth, density, distribution and vital statistics
demographics *n.*	demographic data used esp. to identify consumer markets

(A878, THE AMERICAN HERITAGE DICTIONARY 380 (2nd Ed. 1985).) It is therefore appropriate to construe the term "demographic . . . preferences" in these claim limitations to refer to preferences associated with a group of consumers that has a particular set of qualities. Kroy respectfully requests that the Court construe the term to have that meaning.

Kroy agrees with Defendants' proposed construction to the extent that it refers to preferences based on consumer traits such as sex, marital status, income, occupation and location. We would not object to adding Defendants' representative list of demographic traits to Kroy's proposed interpretation. However, Kroy does not agree that demographic preferences must be based on "directly observable traits" as Defendants' proposal would require. The meaning of this aspect of Defendants' proposal is not clear, and neither the '830 patent specification nor any extrinsic sources describe direct observability as the decisive aspect of demographic traits. This aspect of Defendants' proposal creates a risk of jury confusion. A person's income, for example, may not be directly observable. Yet income is a well-accepted as a demographic trait, as Defendants acknowledge.

Accordingly, the Court should accept Kroy's proposed interpretation of this term. Alternatively, the Court should accept Kroy's interpretation modified to include the examples of demographic data set forth in Defendants' proposal.

13. Term No. 13 - "psychographic preferences"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
preferences associated with a consumer's attitudes, interests, values, opinions or behaviors	preferences based on non-directly observable traits of a consumer (e.g., interests, opinions, values, attitudes, lifestyles)

Based on the ordinary meaning of "psychographic" in the relevant field, the term "psychographic preferences" in these same two claim limitations refers to preferences associated with a consumer's attitudes, interests, values, opinions or behaviors.

Psychographic information relates to one's attitudes, interests, values, opinions or behaviors. This general understanding of demographic information to those skilled in the art is shown by the following representative references:

> psychographics *n*. market research or statistics classifying population groups according to psychological variables (as attitudes, values, or fears)

(A884, http://www.merriam-webster.com/dictionary/psychographic) (last visited Dec. 23, 2013).)

> Psychographics is the study of personality, values, attitudes, interests, and lifestyles.
>
> Some categories of psychographic factors used in market segmentation include: activity, interest, opinion (AIOs), attitudes, values, behavior.

(A898-99, http://en.wikipedia.org/wiki/Psychographic) (last visited Dec. 23, 2013).) Kroy's proposed construction appropriately reflects the ordinary meaning of the term "psychographic" and its usage in the context of these claim limitations.

Defendants' proposed construction correctly recognizes that psychographic preferences relate to consumer traits such as interests, opinions, values, attitudes and lifestyles. However, Kroy is unable to accept Defendants' proposal as presently stated because of the language "non-directly observable." We again submit that observability is not critical, and inclusion of this concept into the meaning of "psychographic preferences" risks jury confusion. For example, lifestyle choices and behavior may be directly observable, but these traits are nevertheless well accepted as psychological traits.

14. Term No. 14 - "a sponsor-selected consumer user"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary. If construed, the term means: "one or more consumer users selected by a sponsor."	a particular consumer selected from a group of consumers by the sponsor based on demographic and psychographic criteria

As mentioned, system claim 1 includes a limitation requiring "code adapted to provide a sponsor-selected specific award unit item . . . tailored to demographic and psychographic preferences of a sponsor-selected consumer user . . . ." Method claim 19 recites "providing said sponsor-selected specific award unit item tailored according to demographic and psychographic preferences of a sponsor-selected consumer user . . . ." The phrase "a sponsor-selected consumer user" is not ambiguous in these limitations and need not be construed. As Kroy's alternate proposal reflects, the only aspect of the phrase potentially requiring clarification is the article "a," which means "one or more" according to the default legal rule of construction applicable to these open ended claims.

The plain language of these claim limitations shows that Defendants' proposed construction is erroneous and should not be adopted. The claims indicate that a specific award unit item is both (1) selected by a sponsor and (2) tailored to demographic and psychographic preferences of a sponsor-selected consumer user. The claims do not say that the consumer user is selected by a sponsor based on demographic and psychographic criteria. Defendants' proposal would add a new requirement that just isn't there. As discussed in Section III above, that is not the Court's role in claim construction.

15. Term No. 15 - "geographic location for fulfillment"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary beyond the construction of "a sponsor-selected geographic location for fulfillment."	specific store where award can be redeemed

The term "geographic location for fulfillment" is subsumed within the complete phrase "a sponsor-selected geographic location for fulfillment." Kroy submits that it should not be separately construed. We address the meaning of the complete phrase in the next section.

16. Term No. 16 - "a sponsor-selected geographic location for fulfillment"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary. If construed, the term means: "one or more places selected by a sponsor for fulfillment."	specific store where an award can be redeemed selected by the sponsor (not the consumer)

The automated award fulfillment application program executed on the host computer of the system of claim 1 includes "code adapted to provide a sponsor-selected geographic location for fulfillment." Method claim 19 similarly provides for automated award fulfillment comprising "providing a sponsor-selected geographic location for fulfillment." The phrase "a sponsor-selected geographic location for fulfillment" is not ambiguous in this context, and therefore need not be construed. If construed, it should be given the meaning: "one or more places selected by a sponsor for fulfillment." Defendants' proposed interpretation – "specific store where an award can be redeemed selected by the sponsor (not the consumer)" – does not comport with the ordinary meaning of the chosen claim language, is not dictated by the intrinsic record, and should therefore be rejected.

The disputed phrase has a broad and easily understandable meaning derived from the ordinary meanings of the chosen words "geographic" and "location," and inclusion of the open-ended article "a" to invoke the presumptive connotation of "one or more." The ordinary and well-established meaning of "geographic location" refers to and includes any designated place, and is not limited to a "specific store." There are obviously many geographic locations that are not store locations.

The general understanding of this term to those skilled in the art is shown by the following representative references:

geographic *adj.*	of or relating to geography
geography *n.*	study of the earth and its features and of the distribution of life on the earth, including human life and the effects of human activity;
	geographic characteristics of an area

(A896, WEBSTER'S II NEW COLLEGE DICTIONARY 467 (1995).)

geographical *adj.*	of or pertaining to geography;
	of or pertaining to the natural features, population, industries, etc., of a region or regions
geography	the science dealing with the areal differentiation of the earth's surface, as shown in the character, arrangement, and interrelations over the world of such elements as climate, elevation, soil, vegetation, population, land use, industries, or states, and of the unit areas formed by the complex of these individual elements

(A889, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 798 (2nd Ed. 1997).)

location *n.*	a place where something is or might be located: site

(A897, WEBSTER'S II NEW COLLEGE DICTIONARY 643 (1995).)

location *n.*	a place of settlement, activity, or residence;
	a place or situation occupied;
	a tract of land of designated situation or limits

(A890, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1128 (2nd Ed.1997).)

location, *noun*	area, demesne, district, environment, fixation, locale, locality, locus, neighborhood, place, placement, plot, point,

> position, post, purlieus, quarter, region, scene, section, site, spot, station, territory, vicinage, vicinity, zone

(A881, BURTON'S LEGAL THESAURUS 341 (3rd Ed. 1998).)

Defendants' proposal does not reflect the ordinary meaning of "geographic location." The term geographic location applies to any identifiable place, region, territory, area, etc. within the greater earth. It is not confined only to the location of a store. A store location is one example of a geographic location; but certainly not the only type of location that meets this generic term.

No claim recites providing "a specific store" for fulfillment. If "a sponsor-selected geographic location" for fulfillment was intended to mean "a specific store," the claims would certainly have included language to that effect. The absence of any language limiting the location to that of a specific store is strong evidence that the term "geographic location" would be understood to have its full meaning encompassing any place selected by the sponsor for fulfillment. The role of the Court in claim construction is to give effect to the chosen claim language; not to rewrite the claim to describe something other than what the plain language dictates.

Each of the claims at issue is an open-ended reciting the transitional phrase "comprising." Therefore the presumption that the article "a" means "one or more" applies. As discussed in more detail below, nothing in the claims, specification or prosecution history file suggests, let alone requires, that the invention must be implemented by the sponsor selecting a single location for redemption, let alone a single store location. The specification illustrates the invention by reference to an example embodiment in which a customer may be directed to a particular store to redeem an award. But its full teachings make clear that the sponsor may designate the available locations for redemption in various ways, and that the invention is not limited to providing awards redeemable at only one specific store location.

Specification passages, such as the following, expressly describe the designation of multiple locations:

> Next, at a step 430, the award database 204 is updated to reflect the association of the prize with the particular consumer who has won the prize. Next, at a step 432, the award database 204 may be queried to determine the ***available geographic locations*** of prizes of the type won by the consumer.

(A040, '830 Patent at 21:58-63 (emphasis supplied).) The specification illustrates designating geographic locations, for example, by providing a ZIP code at which the award is available to be redeemed:

> Thus, a price sub-record 878 may include the price for the award. A geographic sub-record 880 may identify the ***geographic locations, such as the ZIP code***, at which the award is available.

(A049, '830 Patent at 39:40-52 (emphasis supplied).)

Here, the applicant was permitted to invoke the general rule and recite the article "a" as an alternative way of claiming one or more locations. Thus, there is no evidence of the rare circumstance justifying a departure from the general rule interpreting "a" as "one or more." Accordingly, the term "a sponsor-selected geographic location" should be construed to mean "one or more places selected by a sponsor for fulfillment."

Other claims reinforce that the disputed phrase "a sponsor-selected geographic location for fulfillment" would not be understood to be confined to the identity of a specific store. For example, claim 4 depends from independent claim 1 and further states that "said automated award fulfillment application program is adapted to allow sponsor-designation of redemption of said award at a geographic location of one of said plurality of providers." As discussed in Section IV.B.6 above, the invention permits a broad range of individuals, companies and other parties to participate as incentive program "providers." Providers are not limited to individuals or entities that operate stores, and, thus, the inclusion of claim 4 reinforces that the sponsor-selected geographic location in the '830 patent claims is not confined to being a store location.

Claim 9, which depends indirectly from independent claim 6, recites fulfillment options including "receiving fulfillment at a sponsor designated geographic location; receiving online fulfillment; receiving offline fulfillment; receiving fulfillment at a merchant; receiving fulfillment at a retailer; or receiving fulfillment at point of sale (POS)." This demonstrates the applicant's awareness of other ways to describe a fulfillment location (e.g., at a retailer, at a POS) and reinforces that the term "sponsor-selected geographic location" is not synonymous with a specific retail store.

Neither the remainder of the patent specification nor its prosecution history supports Defendants' proposed construction of this phrase. Although the patent illustrates implementations of the invention in which a consumer is directed to a particular store to redeem an award, this is only one possible implementation and the specification contains no limiting language requiring that a sponsor must always designate a single store for redemption. The teachings of the invention are more broadly directed to providing greater control to the sponsor over the award fulfillment process, including permitting the sponsor to provide an incentive program with awards targeted or limited geographically as described in Section II above.

The specification emphasized that the invention beneficially permits sponsors to target awards geographically and to run promotions across multiple store retailers:

> Sponsors are able to target awards for giveaway by demographic preferences or geography.

(A050, '830 Patent at 42:43-44.)

> Also, for fulfillment of specific items (including discounts), the system can replace some forms of regular product fulfillment, lessening the need and often saving time over shipping, etc. Further, manufacturers could launch promotions across multiple store networks with a single fulfillment card.

(A050, '830 Patent at 42:59-64.) The disclosed system includes an award database containing information regarding the geographic availability of awards:

> The award database 204 includes information regarding prizes, such as the prices of prizes and the geographic location of individual prizes that are available for incentive programs.

(A039-40, '830 Patent at 20:66-21:2.) The specification is non-limiting as to how geographic locations are delineated, and provides the example of specifying a ZIP code as a location:

> The data included in the award database 204 may further include sub-records associated with each award offered by the retailer. . . . Thus, a price sub-record 878 may include the price for the award. A geographic sub-record 880 may identify the geographic locations, such as the ZIP code, at which the award is available.

(A049, '830 Patent at 39:40-52.) Sponsors exercise some control over award redemption by specifying the fulfillment mode:

> Each prize also must have a selected mode of fulfillment, which is entered by the sponsor at the step 410 through a menu, a set of icons, or the like.

(A039, '830 Patent at 20:24-26.) More than one available geographic location may be specified for a sponsor-selected award. The host system can access this information during the process of automating award fulfillment:

> Next, at a step 432, the award database 204 may be queried to determine the available geographic locations of prizes of the type won by the consumer.

(A040, '830 Patent at 21:61-63.) As a result of the sponsor-selected award and geographic location information, the system may instruct a consumer, for example, to visit a particular retailer to obtain an award:

> At a step 608 the consumer is instructed to visit a retailer to obtain a prize. The consumer presents the card 11 or a promotional item at a step 610. The retailer dials the winner's database at a step 612, inputs the card ID number at a step 614, and determines a match at a step 616.

(A052, '830 Patent at 45:5-9.)

These and other passages from the specification make clear that the invention includes, but is not limited to, implementations in which the sponsor targets an award geographically by specifying a particular store as a fulfillment location. A sponsor may designate the fulfillment location in other ways (e.g., ZIP code, name of retailer, multiple stores of a retail network), and need not designate only one location at which an award may be redeemed. Thus, Kroy's proposed construction – "one or more places selected by a sponsor for fulfillment" – is entirely consistent with the '830 patent specification.

The prosecution history also supports Kroy's proposed interpretation. For example, in explaining this aspect of the invention, the applicant stated to the USPTO examiner:

> Automated award fulfillment, according to the present invention, *includes sponsor designated or selected redemption* whereby the sponsor of the award may select or determine what award unit (see Specification at page 93, line 9, for example) will be provided to the consumer user, and may designate the location of the redemption (see Specification at page 95, line 20, for example). . . . For example, the location may include the geographical location of the retailer, merchant or point of sale (POS) (See for example page 96, lines 2-20).

(A578, Jan. 25, 2002 Reply and Request For Reconsideration at p. 25) (emphasis in original).) This also reflects that the invention is broadly applicable to any manner of designating award fulfillment locations, such as by designating a geographic region that includes the location of a particular retailer or merchant. The prosecution history lends no support for Defendants' contention that the broad phrase "a sponsor-selected geographic location" should be interpreted as if it had instead read "specific store where an award can be redeemed selected by the sponsor (not the consumer)."

17. Term No. 17 - "geographic proximity"

KROY'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION
No construction necessary.	distance

Claim 22 depends indirectly from claim 19 and requires a further step of "providing an optimization application program that identifies an award based on the geographic proximity of an award winner to a redemption location of an award in the database of awards." The term "geographic proximity" is sufficiently clear in this context, and should not be construed.

Defendants cannot point to any ambiguity that would be resolved by replacing the chosen claim language with the word "distance." The word "proximity" means "nearness." (A891, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1557 (2nd Ed. 1997).) Thus claim 22 permits the optimization application program to consider any information reflective of how close the award winner is to a redemption location (for example, comparison of towns, ZIP codes or area codes). The word "distance," on the other hand, refers more specifically to "the extent or amount of space between two things." (A888, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 571 (2nd Ed. 1997).) Defendants' proposed interpretation would therefore appear to limit the optimization application program to one that analyze a specific distance value, when the claim itself is not so limited.

V. CONCLUSION

Kroy respectfully requests that the Court construe the asserted claims in accordance with Kroy's proposals herein.

Date: February 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 17th day of February 2014. Any other counsel of record will be served by first class mail.

/s/ Austin Hansley
Austin Hansley
Attorney for Plaintiff, Kroy IP Holdings LLC